

Interlocutory Order

102 F.T.C.

IN THE MATTER OF
CHAMPION SPARK PLUG COMPANY

Docket 9141. Interlocutory Order, Nov. 10, 1983

ORDER GRANTING IN PART RESPONDENT'S MOTION TO STRIKE

Respondent has moved to strike a footnote and a sentence of text from complaint counsel's appeal brief. Complaint counsel have filed a reply. Respondent has offered a further reply, and has filed a motion under Rule 3.22 for leave to file the reply.

The footnote and the sentence appear in a paragraph in which complaint counsel argue that evidence of a post-acquisition drop in market share is entitled to little weight because an acquiring firm may exercise restraint pending challenge of the acquisition. They support their argument by citation to legal authority and to record evidence. In addition, their argument contains the disputed sentence, which reads, "Furthermore, it is likely that Champion did not fully promote Anco pending the conclusion of this litigation."

The disputed footnote appears as authority for the disputed sentence. The footnote quotes an article in a June 6, 1983, trade publication. The article in turn purports to quote an Anco spokesman, stating that Anco will conduct a more aggressive marketing strategy after the pending litigation is completed. The spokesman is neither named nor otherwise identified in the quoted passage.

Respondent objects that this material is improper, extra-record hearsay. Respondent also asserts that the use of this material violates an order of the Administrative Law Judge, which set December 31, 1980 as the cut-off date for all discovery and record evidence.

Complaint counsel respond that the material was not introduced as evidence about respondent's own behavior. Rather, they assert, it was non-evidentiary material, used to illustrate a generally accepted proposition concerning post-acquisition behavior. As to the ALJ's order setting a cut-off date, complaint counsel assert that the material merely makes the point that post-acquisition data was probably manipulated as a matter of course. Thus, they argue, the date of the article is irrelevant, and the article can be cited without violating the order.

The disputed sentence will not be stricken from complaint counsel's brief. The sentence is a portion of complaint counsel's general argument about post-acquisition behavior, during a period when an acquisition is under challenge.

However, the disputed footnote will be stricken from the brief.

Complaint counsel assert that this material is intended to evidence a general pattern of business behavior, which respondent presumably followed.

As complaint counsel notes, the use of non-evidentiary illustrative material to support a generally accepted proposition has been a proper practice in appellate briefs for nearly three quarters of a century. The well-known "Brandeis brief" submitted in *Muller v. Oregon*, 208 U.S. 412, 420 (1908), illustrates the use of such material. That brief, accepted and relied upon by the Supreme Court, contained substantial extra-record evidence, including citations to ninety published reports. The Commission, like the courts, can rely upon extra-record sources. In one case, for example, the court held that a Commission decision properly included 85 citations to 43 extra-record writings, dealing with economic, social, and political concepts. *Proctor & Gamble Co. v. FTC*, 358 F.2d 74 (6th Cir. 1966), *rev'd on other grounds*, 386 U.S. 568 (1967).

The particular material which complaint counsel cite, however, is highly unreliable. The material contains hearsay within hearsay: a non-record statement by a reporter, describing a non-record statement by a company official. Moreover, the material appears even less reliable because the company official is not identified.

In addition, complaint counsel argue that they were offering the disputed footnote as a factual illustration of how businesses in general (and, by implication, respondent in particular) behave. However, the factual material does not describe business behavior in general, nor does it even describe the behavior of a number of business firms. Rather, it only describes a single firm, the respondent in the proceeding before us. Complaint counsel ask us to consider material concerning a single firm, the respondent, reach conclusions about business practices generally, and then turn around and apply these generalizations to respondent. We reject this as inappropriate.

We are not now addressing complaint counsel's position that post-acquisition market shares are entitled to little weight. We will consider the argument and its legal support at an appropriate time. However, we will not consider the disputed factual illustration, unreliable and limited to respondent's own behavior, to support an argument about general business behavior. For these reasons, we conclude that the disputed footnote contains unreliable and inappropriate material, and we grant respondent's motion to strike the footnote.

Therefore, *it is ordered*, that respondent's motion for leave to file a reply be granted;

It is further ordered, That footnote 3 on page 26 of complaint counsel's appeal brief be stricken.

Complaint

102 F.T.C.

IN THE MATTER OF

FORD MOTOR COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9113. Complaint, July 19, 1978—Decision, Nov. 16, 1983*

This consent order dismisses Count I of the complaint charging Ford Motor Co., a Dearborn, Mich. motor vehicle manufacturer, with alleged violations of Section 2(d) of the Clayton Act, and requires the manufacturer, among other things, to cease paying anything of value to daily rental companies or daily rental systems for advertising furnished by such firms or systems, unless advertising payments are made available to competing independent daily rental companies in accordance with terms set forth in the order. Within 90 days from the effective date of the order, and annually thereafter, Ford is required to inform those daily rental companies having no joint advertising agreement with respondent or any other automobile manufacturer, of advertising programs available to daily rental companies that agree to feature Ford products in their advertising and fleets. The order further requires that Ford make a good faith effort to negotiate advertising agreements with such companies. Provisions of the order are to remain in effect for a period of ten years and apply only to agreements relating to daily rental advertising within the United States.

Appearances

For the Commission: *Robert W. Rosen and Paul Kane.*

For the respondent: *Richard E. Carlton*, New York City and *Charles E. Dorkey, III*, Washington, D.C., of *Sullivan & Cromwell*, and *William A. Zolbert* and *John R. Phillips*, in-house counsel, Dearborn, Mich.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Ford Motor Company [hereinafter referred to as Ford], has violated and is now violating the provisions of Section 2(d) of the Clayton Act, as amended (15 U.S.C. 13), and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Ford is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at The American Way, Dearborn, Michigan.